NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(NOW THE CENTRAL DISTRICT)

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I

STATEMENT OF JURISDICTION

On January 26, 1966, appellant was indicted, along with three other defendants, in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling heroin on January 10, 1966, in violation of Title 21, United States Code, Section 174 [C. T. 2].[1/] Following a trial by jury before the Honorable Francis C. Whelan, United States District Judge, from February 17, 1966 to February 25, 1966, appellant Jose Rios-Ramirez was found guilty of both

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1/ "C. T." refers to Clerk's Transcript.

counts [C. T. 19].

Appellant was convicted and sentenced on March 28, 1966, to the custody of the Attorney General for seven years on each count, the sentences to run concurrently [C. T. 79].

Appellant filed, on April 5, 1966, a Notice of Appeal from the Judgment [C. T. 87].

On December 5, 1967, this Court affirmed the conviction, Rios-Ramirez v. United States, 386 F. 2d 831 (9th Cir. 1967).

On August 21, 1968, the Honorable Stanley Barnes, Circuit Judge for the Ninth Circuit, signed an order which states that "this Court now sets aside its affirmance of appellant's conviction and reinstates said appeal . . ."

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys,

sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

* * * * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTION PRESENTED

Whether Bruton v. United States requires a reversal of the instant case.

IV

STATEMENT OF FACTS

The statement of facts appearing in the Brief for Appellee filed in the first appeal is hereby incorporated by reference.

There is no reference in the Opening Brief for Appellant to the transcript of the reporter relating where, in the trial, the error took place. Reference will now be made to those portions of the reporter's transcript which appellant may have had in mind. The following portions are the only relevant portions to the best of the appellee's knowledge:

At p. 333, the following appears in the testimony of Agent Chris Saiz of the Federal Bureau of Narcotics:

> " . . . She [Manzano] told me that she had obtained it in a room in the hotel.
>
> I asked her if she would take us there, show us the room, and she stated she would. "

At p. 334:

> "THE WITNESS: She told me she had gone to the room and had gone to a dresser drawer, had taken the rubber condom with the heroin, and had returned to Room 331, and that was the heroin she had given to Rios. "

Saiz, at 288, testified that Manzano, in his presence, did hand Rios the subject heroin.

At various points in the transcript Judge Whelan admonished the jury that the statements of Manzano were to be considered only with reference to her.

Manzano, herself, testified from 560 to 607 and said that she handed the heroin to Rios-Ramirez, at 573, 574, 575, 576 and

577. She was cross-examined by appellant's counsel from 582 to 599. Cross-examination of Manzano by appellant's counsel in reference to handing the heroin to appellant appears at 592 and 593. Also, at 583, 585, 587-88 and 591 there is cross-examination of Manzano by appellant's counsel relative to her statements to Saiz, thereby adopting these statements for his purposes.

In Manzano's direct examination she testified that she handed the heroin to Rios-Ramirez, at 573, 574, 575, 576 and 577.

V

ARGUMENT

BRUTON v. UNITED STATES DOES NOT REQUIRE REVERSAL OF THE CONVICTION AND IS NOT APPLICABLE.

In Bruton v. United States, _____ U.S. _____, 20 L. Ed. 2d 476 (1968), the Supreme Court held where a co-defendant does not testify, and his confession is admitted which implicates other defendants on trial, then there is a deprivation of the right to be confronted by one's accusers and reversal is required. In Bruton neither defendant testified or offered any evidence at the trial, Evans v. United States, 375 F. 2d 355, fn. 2 at 357 (8th Cir. 1967).

In the instant case Rios-Ramirez was not deprived of his confrontation rights inasmuch as Manzano testified, and was cross-examined by Rios-Ramirez's attorney. The right the

Supreme Court has protected by its Bruton decision was protected by Judge Whelan since there was no deprivation of the right to be confronted.

It is problematical whether reversal would be required under the retroactive application of Bruton if Manzano had not testified. Even under those circumstances it is doubted that Rios-Ramirez would have been prejudiced by the admission of the one mention of his name. Saiz testified as to his personal observation of the negotiations by Rios-Ramirez, and his receipt of the purchase price after handing Saiz the heroin. Rios-Ramirez admitted, on the stand that he received the money from Saiz, at p. 538, and then had the money in his possession when the agents returned to make the arrest, at 539-40.

CONCLUSION

The conviction should be affirmed for the above-stated reasons.

Respectfully submitted,

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